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GREEN PAPER
on European Union Consumer Protection

(presented by the Commission)

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1. CONSULTATION ON EU CONSUMER PROTECTION

The purpose of this green paper is to launch an extensive public consultation on the future direction of EU consumer protection. To stimulate a well-informed debate, it sets out an analysis of the current situation and possible options for the future.

The Commission invites interested parties to comment by 15 January 2002. Comments are invited on all aspects of the document but in particular on the following questions:

- *What are the main barriers faced by consumers and business resulting from differences in national regulations on fair/good commercial practices in respect to advertising and practices related to the pre-contractual, contractual and after sales aspects of business-consumer relations?*
- *Do you agree that there is a need to reform consumer protection as regards this aspect of the internal market?*
- *Should reform be pursued on the basis of the existing specific approach or the mixed approach outlined below?*
- *What is the likely impact of the two approaches in terms of costs and benefits for consumers and business?*

If the specific approach were to be pursued:

- *What are the priorities for harmonisation?*

If the mixed approach were to be pursued:

- *What would be the key elements of a general clause, the general tests and core rules for regulating commercial practices?*
- *Which would be better: a framework directive with a general clause based on fair commercial practices or based only on misleading and deceptive practices? Which approach is more feasible? Which is more likely to address the problem of fragmentation in the internal market in the interests of consumers?*
- *Would it be useful to include a basis for self-regulation in a framework directive? If so, what are the key elements of such options and criteria for their inclusion?*
- *Would it be useful for non-binding practical guidance to be developed? Would this guidance be preferable in the form of Commission recommendations or through an indicative list of permitted and illicit examples annexed to the directive?*

- *Should there be a role for stakeholder participation in the development of the non-binding legal guidance?*
- *Is a legal framework for improving co-operation between consumer protection enforcement authorities needed?*
- *What would be the key elements of such a legal framework?*

Please send your comments (marked "Green Paper on EU Consumer Protection") to:

The European Commission
Health and Consumer Protection Directorate General
F101 06/52
Rue de la Loi 200
B-1049 Brussels

Or by email to: consultsanco@cec.eu.int

In addition, the Commission intends to organise a hearing for interested parties and a consultation of national authorities.

2. CONSUMER PROTECTION IN THE INTERNAL MARKET

2.1 Introduction

For the internal market to yield its benefits to consumers, they must be able to have easy access to goods and services promoted, offered and sold across the borders. It is the cross-border movement of goods and services that allows consumers to search out bargains and innovative products and services and thus ensures that they optimise their consumption decisions. This cross-border demand increases competitive pressure within the internal market and allows for a more efficient and competitively priced supply of goods and services. This virtuous circle can only be achieved if the regulatory framework in place encourages consumers and businesses to engage in cross-border trade. Different national laws on commercial practices relating to business–consumer relations can hinder this evolution.

The EU dimension to consumer protection (here understood as the regulation of consumer economic interests and excluding health and safety matters and other connected concerns) has existed for over twenty-five years. Article 153 of the EC Treaty enshrines a number of consumer rights - to information, education and representation. EU consumer protection directives, usually based on the internal market provisions of Article 95 (ex Article 100a) of the EC Treaty, have fleshed out the detail of certain of these rights. Further EU directives, whose primary purpose is not consumer protection, also have a direct effect on consumer protection. National regulations and jurisprudence in turn have an impact on consumer protection in the internal market.

However, consumer protection in the internal market is faced with a fragmented set of regulations and a fragmented system of enforcement. The prospect of enlargement brings the risk of further fragmentation of the internal market and additional enforcement problems. The circulation of Euro notes and coins beginning in January 2002 gives a huge opportunity to develop the consumer internal market. If it is not taken, citizens will be left with the impression that the EU's core project - the internal market - is an irrelevance to their daily

lives and simply a project designed to serve the interests of business. The goals of consumer protection are to deliver a system of regulation that:

- achieves as high as possible a level of consumer protection whilst also keeping costs to business to a minimum;
- is as simple as possible and is sufficiently flexible to respond quickly to the market, and which involves stakeholders as much as possible ;
- provides legal certainty and ensures its efficient and effective enforcement, especially in cross-border cases.

Three studies have been produced for the Commission¹ to provide a comprehensive survey of consumer protection regulations at national and EU level. The following paragraphs provide an overall analysis of their impact.

2.2 EU-level regulation and jurisprudence

EU consumer protection directives fall into two broad categories: generally applicable directives and directives containing rules regarding specific sectors or selling methods. An enforcement mechanism is provided by the Directive on injunctions. The box below summarises the existing directives.

EU Consumer Protection Directives

General rules - Directive on Misleading Advertising², as amended by Directive on comparative advertising³. Directive on price indications. Directive on unfair terms in consumer contracts⁴. Directive on the sale of consumer goods and associated guarantees⁵.

Rules on sectors and selling methods – Directives on foodstuffs⁶, cosmetics⁷, textile names⁸ medicinal products for human use⁹, package travel,¹⁰ contracts negotiated away from business premises¹¹, consumer credit¹², distance selling contracts¹³, measuring instruments¹⁴ and timeshare¹⁵.

Enforcement - Directive on injunctions¹⁶.

In addition, further EU legislation, which does not have consumer protection as its primary purpose, provides for some consumer protection or regulates the power of national authorities to introduce consumer protection regulations. For example the e-commerce directive¹⁷ covers advertising and marketing to consumers by information society service providers. The television without frontiers directive¹⁸ also coordinates certain aspects of commercial communications through broadcasting means. It provides for a uniform high level of protection, application of the country of origin principle, precisely defined common definitions and clear enforcement requirements.

Furthermore, the Brussels Convention (now enshrined in an EU regulation¹⁹) and the Rome Convention²⁰ establish rules, in cases of a cross-border contractual dispute within the EU, to determine which Member State Court should hear the case (jurisdiction) and which Member State's law will apply to the contract (applicable law). Finally, there is a body of ECJ jurisprudence covering the compatibility of certain national consumer protection rules with the internal market²¹.

The main characteristics of EU consumer protection are as follows:

- Existing EU consumer protection directives, when compared to national regulation, do not constitute a comprehensive regulatory framework for business-consumer commercial practices, the central aim of consumer protection. While some areas have been effectively targeted, other key areas are not covered by EU rules, notably marketing practices, practices linked to the contract, payment and after-sales services. The development of new commercial practices and technology has also tended to blur traditional distinctions made in EU rules between the different stages of the transaction, thereby adding an element of uncertainty.
- Some of the directives, notably the sector-specific ones, have developed as a very detailed response to specific identifiable problems at a particular moment in time. This approach, combined with the long period between the proposal and implementation of EU measures (the distance selling directive was proposed in June 1992 but was not due to be implemented until June 2000), has guaranteed a certain level of obsolescence as market practices have moved on. This could make EU rules irrelevant, unnecessarily restrict innovation or allow rogue traders to keep one step ahead of the law. The time involved in modifying these directives to adapt them to technological development while maintaining the same level of consumer protection compounds such inflexibility.

Case study: the distance selling directive and the timeshare directive

The distance selling Directive provides a number of contractual rights for consumers when they buy goods or services from a supplier who they do not meet face to face. In particular, a number of information requirements are stipulated which are required to be provided in a 'durable medium' in order to allow the consumer to permanently retain essential contractual information. This creates no problems if the medium used for the transaction is either the post or e-mail. However, the development of distance selling via new mobile telephone technology could be restricted by such requirements and the limits of current technology. This may stifle innovation and undermine consumer protection.

New marketing techniques for timeshare have been designed to ensure that in some circumstances they are excluded from the scope of the directive and its key obligations. For example, some sellers are offering contracts for a period less than three years or stipulating an annual period of use of less than 7 days. In addition, timeshare-type contracts are being offered through insurance or membership of a club or through point schemes with the purpose of excluding such arrangements from the scope of the directive.

- The interaction between the EU consumer protection rules and the other measures cited has created a regulatory framework which is complicated and difficult to understand for business and consumers.
- The jurisprudence of the European Court of Justice on possible justifications for barriers to the free movement of goods and services on consumer protection grounds does not provide a solution because it has been limited to case-specific issues.
- Although it is developing fast in many Member States, self-regulation, through codes of conduct, is severely constrained at EU-level. Recent attempts that have been made to develop EU-level self-regulation have had only mixed results. Self-regulation has been shown to be a potentially useful complement to regulation that can reduce the need for very detailed legislation and provide benefits for consumers. Although codes of conduct are specifically referred to in some EU legislation, they have been unable to fulfil their potential at EU level because of the degree of national legal diversity. Moreover, further

problems stem from the uncertainty over the status of commitments made in codes and their enforceability.

- In contrast to the work of standardisation bodies in the 'new approach'²², and management and labour representatives in the social dialogue on employment regulation, there is no framework for formal stakeholder participation in the regulatory process at EU level. As markets diversify, there is a growing need for more expert input into regulation. Stakeholder involvement can also enhance the acceptance of regulatory decisions. Stakeholder participation at EU-level depends on competent and representative stakeholder bodies, able to represent interest groups effectively.

2.3 National consumer protection regulation and jurisprudence

Where no Community legislation or case law exists, Member States national regulation is applicable which may differ in its substance and its application. Each Member State has a relatively well developed regulatory environment aimed either specifically at consumer protection or which regulate business-consumer commercial practices to other ends. However in addition to the same kind of regulations that exist at EU level, many Member States have a general legal principle, sometimes supported by specific laws, for regulating business-consumer commercial practices.

General principles

The general principle of *contra bonos mores* can be seen in laws of Austria²³, Greece²⁴ and Portugal²⁵ and Germany²⁶. The principle of *Fair commercial practices* can be seen in the legislation of Belgium²⁷, Italy²⁸, Luxembourg²⁹ and Spain³⁰. France³¹ and the Netherlands³² adopt general provisions from the law of tort, the latter under the concept of *unlawfulness*. There are many similarities in the principle of *good marketing practices* adopted by Denmark³³, Finland³⁴ and Sweden³⁵. Similar general principles can also be found in the legal systems of many third countries, but notably the US, Canada (where consumer protection is regulated at provincial level) and Australia. Although no such overarching legal standard regulating the consumer-business relationship exists in the UK or Ireland, equivalent principles do exist within their legal systems³⁶.

These general principles have either developed through further specific legislation or their development has been left to the courts, over many decades, which have produced a comprehensive and detailed jurisprudence. In each Member State its development has varied depending on the legal system and the scope and aim of the general principle. The principles originated for different reasons, even if they now serve to regulate business-consumer commercial practices. Thus in Germany and Austria, the appreciation of the general principle has been expanded from the protection of competitors against unfair commercial practices to also cover the protection of consumers. In France and Spain, these aims are treated separately - consumer protection is directly foreseen by specific legislation but consumers are protected indirectly by the general principles and regulations aimed at the protection of competitors. In contrast, Denmark and Sweden have adopted measures aimed specifically at the protection of both the consumer and competitors. The scope and application of these general unfair trading laws vary widely in practice between some Member States due to their objective and construction. The development of such variations can act as a barrier to trade and distort competition by ensuring that similar practices are treated in wholly different ways throughout the entire EU.

In addition, consumer protection rules at EU level generally allow Member States to take more detailed or stricter measures (through the so-called ‘minimum clauses’) to protect consumers, or, as is more common, to maintain existing rules, provided they are stricter than the EU rules. Thus, this generates further divergences between national laws in addition to those present in non-harmonised areas of consumer protection.

The main characteristics of the interaction between national and EU regulations within the internal market are as follows:

- Considerable divergences exist in the laws applied to business-consumer commercial practices in the internal market, whether resulting from national specific regulations, differences in general principles or from different jurisprudence. The treatment of advertising, through national rules on ‘fair advertising’, differs, as does the treatment of advertising claims (for health ('miracle products'), environmental or social benefits) and advertising to children (including sponsorship for educational programmes, sports events and marketing in schools). Marketing practices such as those covered by the proposed Regulation on sales promotions (i.e. discounts, simple reductions, rebates, joint-offers, free gifts, coupons, vouchers and commercial contests and games) and others, such as lotteries and gambling, mock auctions, pyramid selling, multi-level marketing and ‘bait and switch’ marketing are subject to different national rules. Commercial practices related to payment, the subject matter of the contract, price estimates, execution, performance, delivery, complaint-handling and after-sales service (e.g. premium rate help-lines, commercial guarantees, substitution, repair) also differ. The bulk of the differences in national rules concern information requirements, although some practices are wholly or partially prohibited in some Member States but permitted in others.

Case study: Multi-level direct selling.

Generally, this entails a supplier setting up a distribution network for its products through recruiting customers to sell to consumers they know. Some countries rely on general fraud provisions to regulate such practices, while others rely on consumer protection laws (e.g. Italy and the Netherlands), and still others rely on unfair competition laws (e.g. Austria, Belgium, France, Germany and Spain). The wide variety of divergent national rules ranging from outright prohibition of doorstep selling (e.g. as in Luxembourg for example), to detailed regulation of how legitimate Multi-level Direct Selling may be performed (e.g. for example in Spain and the UK), means that companies in this sector must restructure their marketing plans and materials from one country to another to ensure compliance with the individual Member States' rules. Multi-level Direct Selling companies are thus prevented from developing a truly pan-European sales and marketing strategy because of the numerous disparities among national laws throughout the EU.

- The use of self-regulation and codes of conduct varies greatly among the Member States. In Denmark, Sweden and Finland, the use of codes is encouraged to flesh out general rules. The involvement of the consumer enforcement bodies is more significant in elaborating these codes. Codes are also widespread in UK, Ireland and Netherlands, although consumer enforcement bodies have a more informal role. The use of self-regulation as a complement to regulation is less well-known in other Member States. The use of self-regulation appears to be growing in the EU, although along different lines in each Member State (see box below).

Case study: E-commerce codes of conduct

Codes of conduct have proved particularly popular for e-commerce. In Denmark, Sweden and Finland, efforts are underway to develop a national e-commerce code of conduct, bringing together business and consumer organisations under government sponsorship. In Netherlands, UK and Germany, recognising that many codes of conduct for e-commerce develop, governments have worked with consumers and business on projects to establish criteria for codes and arms-length bodies to monitor them. While the respective codes and criteria being developed have many common points, they all differ in order to reflect different underlying national rules.

- The impact of these differences on consumers and business seems likely to grow with the development of ‘new economy’ commercial practices, unforeseen by existing specific rules but which have already been caught by national general principles and treated in different ways. New advertising practices which challenge traditional print media distinctions between media content and advertising (e.g. website sponsorship, affiliation, remunerated search tools, use of meta-data and links, referrals and reviews) fall into this category. New marketing methods such as cookies, ‘spidering’, co-shopping and power shopping are also challenging traditional rules. Online gambling and gaming, internet currencies, internet auctions and the use of technology will also reveal differences in national rules in the internal market. As the development of the internet has led to new practices unforeseen by national rules, the development of commerce via mobile telephones seems likely to do the same.

Case studies

Powershopping (or co-shopping) describes an accumulation of customers that is gathered through the internet in order to buy goods or services at a reduced price that is granted by providers of the goods or services provided that a sufficient quantity has been ordered. It is unclear how such practices will be treated in all the Member States. However a German court, Landgericht Köln, on 12 October 2000 ruled that the practice of “power shopping”, by which online shoppers obtain bigger discounts by banding together as a group is a violation of Germany's law against unfair competition.

New payment techniques such as the use of mobile and other telephone billing as a means for the supplier to charge for goods and services are emerging. Whilst this can provide opportunities for consumers it also poses serious risks, especially when employed by fraudsters who have been denied credit card payment facilities by banks. Evidence of this problem has emerged in the United States.

Question for consultation

- *What are the main barriers faced by consumers and business resulting from differences in national regulations on fair/good commercial practices in respect to advertising and practices related to the pre-contractual, contractual and after sales aspects of business-consumer relations?*

3. THE FUTURE DIRECTION OF EU CONSUMER PROTECTION

3.1 The need for action

The cumulative impact of this situation is a 'consumer internal market' that has not achieved its potential nor matched the development of the internal market in business-to-business transactions. Consumers rarely participate directly in the internal market through cross-border shopping. For business, above all for SMEs, the differing treatment of identical commercial practices in each Member State is a daunting deterrent to developing cross-border sales and exploiting the internal market. At best, there is lack of certainty and clarity about fifteen sets of legal obligations. At worst, the sheer number of obligations is off-putting to nearly all businesses but those who can afford to establish in all Member States. For consumers, the lack of clarity and security over their rights is an important brake on their confidence and trust. The internal market, like all markets, depends on consumer confidence. Directives such as the television without frontiers directive, which are based on internal market rules avoid the need to apply fifteen sets of national rules in the fields coordinated by these directives, as the country of origin rules apply. This also facilitates the control of the service provider by the responsible authority.

A fully functioning consumer internal market could make a substantial contribution to meeting the goals of the EU. The internal market's main asset is that it has the largest pool of consumer demand in the world - and this asset is not being fully exploited. Enabling businesses, especially SMEs, to access this potential, as easily as domestic markets would be a powerful stimulus to competitiveness. Simplifying existing rules and, where possible, deregulating would also help reduce disproportionate burdens on business. Consumers would have access to greater choice and better prices. Cross-border shopping would not supplant domestic shopping but would become a significant medium with a wider impact on markets than its share of retail sales. The experience of cars shows that cross-border shopping can have a powerful indirect competitive effect on national markets, as consumers put pressure on suppliers to match prices they can obtain elsewhere in the internal market. Commission and other studies on prices in the internal market are showing that substantial price divergences similar to those found for cars exist in other consumer products. A recent Commission Prices survey indicated that price differences of 30 or 40% between the EU countries with lowest and highest prices are not exceptional, for example, for branded consumer electronics goods (and such differences cannot be explained only by differences in indirect taxes)³⁷. These divergences indicate, in part, the consequences of a consumer internal market that is not functioning properly.

This situation is not new. However, there is a case for further action to complete the consumer internal market now. The circulation of Euro notes and coins from 1 January 2002 will remove one major psychological obstacle to direct consumer participation in the internal market. E-commerce has the potential to remove many of the geographical and logistical barriers to the consumer internal market. SME's and consumers at different ends of the

European continent can develop commercial relationships more easily than ever before. This potential remains unfulfilled³⁸, with e-commerce representing not only a small part of retail sales but also largely confined within national borders.

The prospect of enlargement also calls for further action, since without some reform, it could further complicate the legal picture. It is also an opportunity to endow candidate countries that do not always have a long history of consumer protection with simple and effective rules.

The political case for reform has been recognised at the highest level. The Lisbon European Council set a new strategic goal for the Union '*to become the most competitive and dynamic knowledge-based economy in the world*' by completing the internal market, developing predictable rules for e-commerce and simplifying and improving the regulatory environment. The informal internal market/consumer Council at Lund on 27-28 April 2001 also acknowledged the need to enhance the consumer dimension of the internal market.

Finally a fully functioning consumer internal market could play an important part in the strategy to bring the EU closer to its citizens, by dispelling the myth that internal market is a corporate business project and delivering tangible economic benefits to their daily life.

3.2 Overall approach

Where cross-border restrictions to business-to-consumer trade exist, a greater degree of harmonisation of the rules that regulate business-consumer commercial practices is essential to the development of a fully functioning consumer internal market. The Commission has already acknowledged, in its communication on the internal market in services³⁹ that 'additional harmonisation measures are likely to be appropriate in areas with significant health and consumer protection considerations'.

The central choice therefore revolves around the type of method needed to achieve greater harmonisation. There are essentially two options:

- A specific approach based on the adoption of a series of further directives, or
- a mixed approach of a comprehensive framework directive, supplemented by targeted directives, where necessary

3.3 Specific approach

Greater harmonisation could be achieved through a series of further specific directives. The number of directives needed is hard to estimate. Directives covering advertising (except the issues covered by the television without frontiers directive), marketing practices, payment and after sales services might be considered, together with certain sector-specific directives.

For example, the Commission has already begun work in the area of commercial communications and has examined in detail with Member States representatives in its Expert Group the possibilities of applying the principle of mutual recognition to the national rules in the sub-area of sales promotions⁴⁰. Such commercial practices are used by businesses to publicise their products and services and are subject to detailed national rules or jurisprudence that differ widely across Member States. The work of the Expert Group has shown that the only means to allow for free movement of such services based on a high level of consumer protection in this field is to come forward with greater harmonisation. This is proposed in a draft Regulation on sales promotions in the internal market.

Such an approach has considerable advantages - it is a familiar, reliable method that has led to the adoption of existing legislative provisions. It is also in principle easier to reach agreement on directives with a relatively narrow scope and to introduce change in a specific way over a long period of time.

However, there are clearly some doubts as to the effectiveness of relying exclusively on this approach in delivering a genuine internal market. The limited scope of existing consumer protection regulation at EU level has justified the need for the so-called minimum clauses in EU directives. Continuing with the approach of selective, specific legislation would require a clear commitment from the Member States to change this policy, both in respect of existing and new directives. In addition, many of the existing consumer protection directives will require amendment in order to address the obsolescence that has developed through new market developments or legislative requirements becoming outdated. Together this represents a formidable, if achievable, long-term programme.

3.4 Mixed approach

The alternative would be to develop a comprehensive, technology-neutral, EU framework directive to harmonise national fairness rules for business-consumer commercial practices. This would be based on similar models to those seen in certain Member States and third countries for consumer protection and at EU level for product safety⁴¹ and that proposed for food safety⁴². A framework directive would not override sector-specific directives such as the unfair contract terms directive, as well as future legislation, such as the proposed Regulation on sales promotions and future amendments to this legislation (e.g. television without frontiers directive). The framework directive would amount to a safety net to cover practices where cross-border restrictions are identified and which fall outside the coordinated fields of the sector-specific Directives. Where necessary, the framework directive would be accompanied in due course by a reform of existing consumer protection directives to ensure the overall coherence of the consumer protection system. Such a reform would be undertaken once the framework directive has been established and experience has been gained of its operation in practice.

To provide the required certainty and prevent differing legal interpretations by national courts, the framework directive would have to be more than simply a general principle regulating business-consumer commercial practices. It would address the main differences in national rules on commercial practices which affected the operation of the internal market, through establishing clear EU-wide rules through harmonisation.

The main advantage of a framework approach compared to a specific approach is that its comprehensive nature reduces the need for further detailed consumer protection regulation. The existence of general benchmarks enable emerging commercial practices to be addressed without recourse to new regulation. Business can innovate in greater certainty and unfair practices can be tackled without further rule-making. A framework approach also permits simplification of existing rules. For example, the directives on misleading and comparative advertising could be subsumed into the framework directive. The flexibility of a framework directive would also eliminate the justification for minimum clauses in EU consumer protection directives.

A framework directive could also provide a firm basis for EU-wide self-regulation in the field of consumer protection and for the development of non-binding practical guidance. Both these tools can potentially reduce the need for detailed prescriptive regulation. Finally, a

framework directive can provide the basis for some formal stakeholder participation in the regulatory process.

However, while a single framework directive is also in theory simpler and faster to negotiate than a series of directives, it would contain more issues of substance and therefore be harder to reach consensus.

Questions for consultation

- *Do you agree that there is a need to reform consumer protection as regards this aspect of the internal market?*
- *Should reform be pursued on the basis of the existing specific approach or the mixed approach outlined?*
- *What is the likely impact of the two approaches in terms of costs and benefits for consumers and business?*
- *What are the priorities for harmonisation under the specific approach?*

4. FURTHER ISSUES

If a mixed approach to the reform of consumer protection were chosen, a number of further issues would arise.

4.1 General framework for fair commercial practices

A framework directive would be based on a general clause for consumer-business relations. This could draw on existing legal models based on 'fair commercial practices' or 'good market behaviour'. In essence, it would be a requirement not to engage in unfair commercial practices and would include a general test. Such an approach is comparable to that in the unfair contract terms directive. National rules that purely covered general interest objectives in relation to commercial practices other than consumer protection (e.g. pluralism, the protection of culture, health and safety, decency) and national contract law requirements would be excluded.

The general clause would have to be supplemented with general tests of fairness and specific rules in order to eliminate differences in national rules on commercial practices. These could cover all the elements of fair trading e.g. information disclosure, misleading and deceptive practices or undue influence as well as rules on marketing and commercial practices linked to the contractual and after-sales phases of the transaction. These general principles and rules would address the main issues of uncertainty and diversity and would draw upon:

- ECJ jurisprudence and existing EU legal concepts, notably on misleading advertising and unfair contract terms tests, and;
- National examples on issues such as misleading and deceptive practices, undue influence or pressure, disclosure, vulnerable consumers, equitable bargains and good faith.

4.2 General framework covering misleading and deceptive practices

As an alternative to being based on fair commercial practices, the framework directive could be based on the more restrictive concept of misleading and deceptive practices. It would probably be easier to reach agreement on such a framework directive as this concept is in many ways the common core of unfair trading concepts across the EU. In particular this general prohibition has already been established as the test in the Misleading Advertising Directive. A common EU approach to these matters would be a significant step forward on both consumer protection and a simplification of the regulatory environment. It could also be

conceived as a first step towards a framework directive based on fair commercial practices. However, given the more limited scope the framework directive would not cover the full range of matters covered by a comprehensive duty to trade fairly (e.g. the use of selling techniques based on undue influence). Accordingly, divergent national approaches on matters falling outside the scope of the duty could continue to develop and further specific regulations at EU level would probably be needed.

4.3 Information

Given the importance of information requirements in consumer protection and the consumer's right to information in Article 153 of the EC Treaty, general obligations on information disclosure would be central to both alternatives. A key aspect of this would be a requirement for businesses to disclose all material information to consumers in a timely and clear manner. This would ensure a proper fulfilment of the right to information conferred on consumers by the Treaty. Within the framework directive for fair commercial practices it would also be possible to preclude practices such as deliberate information overload and excessive use of 'small print'. It would, moreover, demonstrate another important dimension of unfair trading, namely that omissions can also constitute an unfair trading practice.

4.4 Self and Co-regulation

Many problems may not be suitable for regulatory action. Self-regulation can achieve some consumer protection goals, especially in industries that recognise they have a strong common interest in retaining consumer confidence and where free riders or rogue traders can harm this confidence. Effective self-regulation that contains clear voluntarily binding commitments towards consumers and which is properly enforced can reduce the need for regulation or co-regulation. At present there is no means of ensuring effective EU-wide self-regulation in the field of consumer protection. A further option is for the framework directive to make this possible, thereby enabling businesses to sign up to one common code of conduct, rather than fifteen. The differences in national laws and general duties do not at present permit the development of genuine EU-wide codes.

Two vital elements would be needed to make the option for EU-wide self-regulation work. First, any general duty would have to define non-compliance with a voluntary commitment made by a business in respect of consumers as either a misleading or unfair trading practice. At present it is only possible to take action against failure to respect a voluntary commitment if this is repeated in advertising, in which case it may be subject to the misleading advertising directive. The introduction of a legal consequence for commitments made through codes of conduct and other voluntary commitments could possibly help business and consumers. Consumers would have the confidence that public enforcement bodies would act as the 'enforcer of last resort'. More rigorously enforced commitments through self-regulation would provide a stronger case for less substantive regulation. More rigorous self-regulation would also tackle the 'free rider' problem, since it would provide an additional point of reference for courts and enforcement authorities in tackling traders outside such agreements.

Second, the scope of the general duty would not only apply to business that traded with consumers but also to trade associations and other organisations that made recommendations on trading practices and drew up codes etc. This is currently the case for the Unfair Contract Terms Directive (Article 7). Given the influence trade associations have on the development of market practices, it makes sense to reinforce the responsibility of their actions in this way. Finally, there would be no provision for the explicit endorsement or approval of codes by the

Commission. Given the potential for abuses of competition rules through codes and the Commission's responsibility for enforcement of these rules, this would not be appropriate.

The Commission has urged the greater use of 'co-regulatory mechanisms' and 'framework directives' in its recent White Paper on Governance⁴³. Any consumer protection proposal that includes co-regulation must therefore comply with the conditions for co-regulation set out in the White Paper. The role and responsibility of code-owners in developing codes and the role of public authorities in their enforcement could both be reinforced and clarified. The combination of a framework directive and a basis for EU-wide self-regulation could be seen as a co-regulatory approach, according to the terms of the White Paper, with some rough similarities with the 'New Approach'.

4.5 Practical guidance

Whilst a framework directive would provide a high degree of legal certainty for business and consumers, a certain risk of divergence in interpretation by national courts would always be present, albeit not to the degree that it exists today. However, a framework directive could make it easier for the ECJ to resolve these issues in future. Further directives could be used to ensure legal certainty, especially for sector-specific issues.

In addition, provision could be made for non-binding practical guidance to be developed in user-friendly language for the benefit of consumers or business, judges and enforcement officials. Although not legally binding, such guidance could enhance certainty and reduce the risk of fragmentation. Such guidance could either be expressed through Commission recommendations or through an indicative list of general and sector-specific examples of commercial practices. Such a list, similar to that used in the unfair contract terms directive, would have the advantage of being more formally linked to the underlying legislation. The possibility for the Commission and the Member States to update the list, through a regulatory committee, could also be considered to prevent obsolescence. In either case, the guidance would have to be developed in an environment of maximum transparency and consultation.

4.6 Stakeholder participation

The introduction of non-binding practical guidance could also permit the introduction of stakeholder participation in the elaboration of such guidance. Stakeholders could be invited by the Commission and the Member States to reach agreement on sector-specific parts of the guidance within a deadline. For this to be possible, the framework directive would have to establish a framework for this participation and criteria for the stakeholder bodies. EU-wide bodies would also need to be better organised and be more capable than at present and their financing would have to be re-examined.

Questions for consultation

If the mixed approach were to be pursued:

- *What would be the key elements of a general clause, the general tests and core rules for regulating commercial practices?*
- *Which would be better: a framework directive with a general clause based on fair commercial practices or based only on misleading and deceptive practices? Which approach is more feasible? Which is more likely to address the problem of fragmentation in the internal market in the interest of consumers?*
- *Would it be useful to include a basis for self-regulation in a framework directive? If so, what are the key elements of such options and criteria for their inclusion?*
- *Would it be useful for non-binding practical guidance to be developed? Would this guidance be preferable in the form of Commission recommendations or through an indicative list of permitted and illicit examples annexed to the directive?*
- *Should there be a role for stakeholder participation in the development of the non-binding legal guidance?*

5. ENFORCEMENT

5.1 Enforcement in the EU today

Any regulatory measures must be linked to adequate enforcement structures that ensure their consistent application. Markets need clear and certain rules but they also require that such rules are effectively enforced. Consumer confidence and a competitive internal market requires a consistent application and enforcement of the law wherever the consumer or business are located. Whether a specific or framework directive approach is employed as a regulatory tool, it needs to be linked to enforcement mechanisms if Member States are to be able to swiftly, efficiently and effectively co-operate in tackling cross-border enforcement issues.

The creation of the internal market has already necessitated the development of some co-operation on enforcement and co-ordination. For example, formal co-operation mechanisms have been put in place with respect to internal market policies on taxation, customs, food and product safety. For consumer protection a mixture of informal mechanisms and one legal instrument exists at present. The Injunctions Directive gives national consumer enforcement bodies and consumer associations nominated by the Member States the power to seek injunctions in courts in their own and other Member States to stop traders infringing EU consumer protection directives. The International Marketing Supervision Network (IMSN) is a bi-annual forum for informal co-operation between enforcement practitioners from around the world. An EU sub-group of enforcement officials also meets bi-annually.

The Commission is an active participant in the IMSN and has also pursued a dialogue with the Member States on the future of co-operation on enforcement issues. Its analysis of the

operation of enforcement in the internal market has identified the following main characteristics of consumer protection enforcement in the internal market:

- Although consumers and consumer associations will continue to have an essential enforcement role to play, through the courts, a fully functioning consumer internal market will also depend on public consumer enforcement authorities acting in co-operation as 'enforcers of last resort'. The ability of public authorities to act to prevent consumer detriment before it happens, when businesses act fraudulently, dishonestly or unfairly and to persuade businesses to change their ways without recourse to time-consuming legal procedures is an essential component of business and consumer confidence. An internal market needs co-ordinated market surveillance.
- The development of e-commerce in particular will increase the need for co-operation. The online environment provides unprecedented opportunities for fraudulent, dishonest or unfair businesses to target consumers from a different jurisdiction and evade enforcement authorities. Article 19 of the Directive on e-commerce requires that Member States have adequate means of supervision and investigation necessary to implement the Directive and co-operate with one another.
- Co-operation between public bodies in different Member States is essential to combat traders acting cross-border in a fraudulent, dishonest or unfair way. The existing informal co-operation arrangements have been highly successful within their informal framework. However they do not provide the necessary co-operation tools that have been developed in other policy areas.
- The injunctions Directive, while filling an important loophole and being an important tool for consumer associations is not likely to become a general-purpose tool to resolve these issues. The cost-benefit for a public authority of launching injunction procedures in foreign jurisdictions are never likely to be sufficiently positive for this to become a day-to-day enforcement tool.
- There is no framework for systematic information exchange ('mutual assistance') about potentially fraudulent, dishonest or unfair traders, spontaneously or on request. Extensive information exchange is the keystone of effective market surveillance. There is no legal basis for the sharing of such information confidentially between enforcement bodies. For example, a database has been created within the IMISN-EU sub-group. It is however limited to being a backward-looking historical tool rather than a 'real-time' enforcement tool, because of confidentiality requirements. Enforcement bodies act only on behalf of consumers within their own jurisdiction, rather, as the internal market demands, on behalf of all EU consumers. There is no framework for co-ordinated enforcement actions against traders targeting consumers in several Member States. Enforcement bodies exist at many levels of government in the Member States - there is however no formal single point of contact for authorities in another Member State and sufficient liaison within each Member State to ensure smooth co-operation.
- The lack of a framework for enforcement co-operation within the EU also has the consequence that the EU is unable to develop effective co-operation with third countries. The development of e-commerce, raising the prospect of global cross-border shopping, calls for such co-operation. To meet this challenge, a formal global co-operation network has been established by the US, Canada and Australia - the EU, Japan and other countries have been invited to participate. Already the global network has been able to overcome the confidentiality problems encountered by the IMISN-EU and has developed a 'real time'

database. The lack of an EU framework for co-operation prevents the EU joining the global network and influencing its development.

- As well as a lack of the practical tools of enforcement co-operation, familiar from other policy areas, there is a lack of a formal framework for co-operation on common projects and exchange of best practice on consumer education, information and representation. Good ideas are not systematically shared and attempts to avoid a duplication of efforts and pool resources have been limited and ad hoc. This is despite the finite and limited resources for enforcement and education, information and representation in all Member States.
- A fully functioning consumer internal market depends on enforcement that is more or less equally effective in all Member States. Article 153 of the EC Treaty was amended by the Treaty of Amsterdam to clarify the Commission's role as monitor of the effectiveness of national policies. At present there is no framework for the Commission to carry out this monitoring role and help to improve enforcement standards across the internal market. The need for the Commission to play this supportive role will increase with enlargement, and the accession of countries without a long history of consumer protection enforcement.
- The Commission is also hampered in its surveillance of the consumer internal market and the impact of consumer protection legislation by a lack of systematic feedback from on the ground in the Member States. In particular, the lack of feedback from enforcement authorities and systematic evidence from consumer complaints make it very hard to evaluate the development of the consumer internal market.

5.2 Options for reinforced co-operation on enforcement

A legal framework for formal co-operation between public authorities is much needed to build the consumer internal market and whilst its further development would clearly complement any regulatory reform as outlined under sections 3 and 4, there is still a clear independent need for such mechanisms. The advantage of a legal framework for co-operation, as can be seen from other policy areas, is that it opens up new possibilities and new tools for enforcement authorities. However, taking some further steps that do not need legislation would also make progress in this area. The use and practice of either formal or non-formal tools can develop over time and in line with need, but cannot begin until such tools are put in place.

A legal framework for co-operation would reap dividends for the internal market on the basis of the present EU consumer protection rules and without any of the reforms of consumer protection set out earlier in the paper being undertaken. The benefits of a legal framework for co-operation would however be greater if any of these options for reform were undertaken. A greater common basis of rules to enforce would help enforcement authorities build co-operation and trust more easily.

In any case, the development of a framework for co-operation would help to improve the feedback between enforcement and regulatory oversight. It is in the nature of consumer protection problems that a mixed policy response is often required, combining regulatory action with enforcement, information and education initiatives. The day to day management of enforcement and regulation should therefore be more closely integrated in future.

A number of possible co-operation tools could also be included in a legal framework for co-operation. These are set out below:

- The nomination of competent authorities by each Member State to co-ordinate enforcement co-operation among national, regional and local bodies and act as a single point of contact. Judicial co-operation would not be covered.
- The establishment of reciprocal mutual assistance rights and obligations among the Member States. Mutual assistance could cover information exchange on request and spontaneously, reciprocal use of national notification, surveillance, investigation and seizure powers. The principle that national enforcement bodies can act on behalf of all EU consumers could also be enshrined in the framework.
- The establishment of common databases and communication networks that respect confidentiality requirements.
- The establishment of obligations on Member States to supply information (statistics, complaints, risk patterns, emergencies) to the Commission for dissemination to other Member States to enhance the co-ordination of market surveillance. This could include the development of an EU system for complaint classification by type and sector. The establishment of obligations on the Commission to monitor and evaluate enforcement in the internal market and the implementation of national policies and to co-ordinate common projects.
- The possibility for Member States to carry out co-ordinated enforcement actions (simultaneous investigations, injunctions etc) albeit under national enforcement powers.
- The possibility to carry out common EU and national projects such as the creation of information and communication networks, common databases, training, seminars, exchanges and common inspections.
- The possibility for the EU to enter into co-operation with third countries on enforcement and join global enforcement networks. The possible association of candidate countries on co-operation initiatives, especially common projects.

Whatever tools were finally chosen for inclusion in the framework for co-operation, their management would require the establishment of a committee of the Commission and Member States, in accordance with Council decision 1999/468/EC⁴⁴. It would have the role of implementing co-operation and acting as the forum for analysis, monitoring, troubleshooting and non-legislative action.

Questions for consultation

- *Is a legal framework for improving co-operation between consumer protection enforcement authorities needed?*
- *What should be the key elements of such a legal framework?*

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- ¹ V.I.E.W. Study on the feasibility of a general legislative framework on fair trading. <http://europa.eu.int/comm/consumers>; PriceWaterhouseCoopers study on consumer law and the information society. <http://europa.eu.int/comm/consumers> and Lex Fori study to identify best practice in the use of soft law and to analyse how this best practice can be made to work for consumers in the EU. <http://europa.eu.int/comm/consumers>
- ² Council Directive 84/450/EC of 10 September 1984 relating to the approximations of laws, regulations and administrative provisions of the Member States concerning misleading advertisements (OJ L250, 19.09.1984)
- ³ Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ L290 23.10.1997)
- ⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L95 21.04.1993, pp. 29-34)
- ⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171 of 07.07.1999, pp. 12-15)
- ⁶ Directive 95/58/EC of 29.11.95 European Parliament and of the Council amending 79/581/EEC on consumer protection in the indication of prices of foodstuffs and Directive 88/314/EEC on consumer protection of prices of non-food products (JO L 299 du 12.12.1995, pp. 11-12)
- ⁷ Council Directive 76/768/EEC of 27.7.1976 on the approximation of laws of the Member States relating to cosmetic products (OJ L262 of 27.9.1976, p.169), amended by Directive 79/661/EEC (OJ L192 of 31.7.1979, p.35), Directive 82/368/EEC (OJ L167 of 15.6.1982, p.1), Directive 83/574/EEC (OJ L332 of 28.11.1983, p.38), Directive 88/667/EEC (OJ L382 of 31.12.1988, 46), Directive 89/679/EEC (OJ L398 of 30.12.89, p.25), Directive 93/35/EEC (OJ L151 of 23.6.1993 p.32) and Directive 97/18/EC (OJ L114 of 1.5.1997).
- ⁸ Directive 96/74/EC of the European Parliament and of the Council of 16.12.1996 on textile names (OJ L32 of 3.2.1997, p.38), amended by Directive 97/37/EC (OJ L169 of 27.6.1997, p.74)
- ⁹ Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use (OJ L113, 30.04.1992)
- ¹⁰ Council Directive 90/314/EEC of 13.06.1990 on package travel, package holidays and package tours (OJ L 158 of 23.06.1990, pp. 59-64)
- ¹¹ Council Directive 85/577/EEC of 20.12.1985 to protect the consumer in respect of contracts negotiated away from business premises -"door to door selling"-(OJ L 372 of 31.12.1985, pp. 31-33)
- ¹² Council Directive 87/102/EEC of 22.12.1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42 of 12.02.1987, pp. 48-53). Amended by: Council Directive 90/88/EEC of 22.02.1990 (OJ L 61 of 10.03.1990, pp. 14-18) Council and European Parliament Directive 98/7/EC of 16.02.1998 (OJ L 101 of 01.04.1998, pp. 17-23)
- ¹³ Directive 97/7/EC of the European Parliament and of the Council, of 20.05.97, on the protection of consumers in respect of distance contracts. (JO L 144 of 04.06.1997, pp. 19-28)
- ¹⁴ Directive 90/384/EC of the Council on the harmonisation of the laws of the Member States relating to non-automatic weighing instruments OJ L189 of 20/07/1990 P 1-16

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- 15 Directive 94/47/EC of the European Parliament and the Council of 26.10.1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-share basis (OJ L 280 of 29.10.1994, pp. 83-87)
- 16 Directive 98/27/EC of the European Parliament and of the Council of 19.05.1998 on injunctions for the protection of consumers' interests. (OJ L 166 of 11.06.1998, pp. 51-56)
- 17 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce), O.J. L178/1 of 17.7.2000
- 18 Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ L298 of 17.10.1989, p.23) as amended by Directive 97/36/EC.
- 19 Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, O.J. L12, 16 January 2001, p.1
- 20 80/934/EEC. Rome Convention on the law applicable to contractual obligations, O.J. L266, 9 October 1980
- 21 Such examples include free gifts (*Oosthoek*, C-286/81 [1982] E.C.R. 4575), slavish imitation (*Industrie Diensten Groep v. Beele Handelmaatschzppij*, C-6/81 [1982] E.C.R. 707), sale at a loss (*Keck and Mithouard*, C-267 & 268/91 [1993] E.C.R. I-6097), parallel imports (*Dansk supermarked v. Imerco*, C-58/80 [1981] E.C.R. 181), misleading advertisement (*Pall corp. v Dahlhausen*, C-283/89 [1990] E.C.R. I-4827; *Verband Sozialer Wettbewerb e.V v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH*, C-315/92 [1994] E.C.R. I-317; *Mars*, C-470/93 [1995] E.C.R. 1923; *Commission v Germany "Sauce Hollandaise"*, C-51/94 [1995] E.C.R. I-3299; *Gut Springenheide*, C-210/96 [1998] E.C.R. I-4657, *Estée Lauder v Lancaster*, C-220/98 *unreported*), price comparisons and enticement (*GB-INNO*, C-362/88 [1990] E.C.R. I-667; *Yves Rocher*, C-156/91 [1993] E.C.R. I-2361), and information requirements (*Commission v UK*, C-207/83 [1985] E.C.R. 1201; *Robertson*, C-220/81 [1982] E.C.R. 2349).
- 22 Council Resolution on "A New Approach to technical harmonisation and standards" of 7 May 1985 OJ C136/1 of 04/06/1985.
- 23 Article 1 of the Bundesgesetz gegen den unlauteren Wettbewerb
- 24 Article 1 of the Act on Unfair Competition
- 25 Article 260, para 1 Código da Propriedade Industrial
- 26 § 1 Gesetz gegen unlautern Wettbewerb
- 27 Article 93 and 94 Loi sur les pratiques du commerce et sur l'information et la protection du consommateur
- 28 Article 2598 Codice Civile
- 29 Article 16 Loi du 27 Novembre 1986 réglementant certaines pratiques commerciales et sanctionnant la concurrence déloyale
- 30 Article 5 Ley Competencia Desleal and Article 6(b) Ley General de Publicidad
- 31 Art. 1382-1384 Code Civil
- 32 Article 6:162 of the 'Burgerlijk Wetboek'

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- 33 §1 Marketing Practices Act
- 34 Consumer Protection Act, part 2 §1
- 35 Article 4, para 1 of the Marketing Act
- 36 The English common law has developed principles such as ‘unconscionability’ and ‘equity’ as a means of ensuring balance and fairness in commercial transactions. A recent report by the UK Financial Services Authority “Treating Customers fairly after the point of sale” (June 2001) examined the concept of ‘fairness’ in the English law and broke it down into a number of identifiable elements which go to make up ‘fair’, and types of conduct which are indicative of acting fairly (see Annex 1).
- 37 Single Market Scoreboard No 8 (28 May 2001) p.17-21.
- 38 The Opinion of the Economic and Social Committee on ‘The effects of e-commerce on the Single Market (SMO)’ shows that in Europe e-commerce currently accounts for less than 1% of total final consumer transactions, i.e. less than traditional mail order business. (OJ C/123, 25.04.01, p.1-10)
- 39 Communication from the Commission to the Council and the European Parliament: An internal market Strategy for Services : COM(2000) 888
- 40 see Opinion of the Expert Group – the regulation of cross-border discounts in the Community (Commercial Communications Journal, Issue 19, June 1999) and Opinion of the Expert Group on the regulation of cross border free gifts and premium offers in the Community (Commercial Communications journal, Issue 24, October 2000)
- 41 Council Directive 92/59/EEC of 29 June 1992 on General Product Safety, O.J. L 228, 11.08.92, p. 24
- 42 Proposal for a Regulation of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Authority, and laying down procedures in matters of food COM(2000) 716 final, 08.11.2000 (JO C 96 E du 27.3.2001, p. 247)
- 43 European Governance: A White Paper (COM(2001) 428)
- 44 Council Decision of 28.6.1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L184 of 17.7.1999, p.23)